

# Wrongfully Recused?

**W**hen does due process compel recusal of a trial judge? Is an appearance of bias, which might undermine the public's confidence in an impartial judiciary, a sufficient basis for demanding recusal of a trial judge? On Nov. 4, 2009, the Supreme Court heard argument in the matter of *People v. Freeman*, and the Court may very well provide some guidance to California courts about the extent to which an appearance of bias imposes a due process obligation on a court to recuse itself.

The United States Supreme Court recently addressed similar concerns in *Caperton v. A.T. Massey Coal Co., Inc.*, 2009 DJAR 8207. The U.S. Supreme Court struggled to identify with specificity the instances where recusal is required. Admitting that bright-line rules were elusive, the *Caperton* Court acknowledged that disqualifying criteria cannot be defined with precision. However, the U.S. Supreme Court has, on several occasions, observed that no judge is permitted to try cases where he has an interest in the outcome. With that principle in mind, the *Caperton* Court concluded that an objective test is preferable to one in which proof of actual bias is required to compel recusal or disqualification. Examining whether a large campaign contribution engendered bias requiring recusal, the *Caperton* Court held that due process requires an objective inquiry into whether the facts and circumstances in the case would provide a possible temptation to the judge to deviate from the "nice, clear and true."



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*People v. Freeman* presents a similarly difficult question. *Freeman* does not involve the easy recusal categories of financial interest in the outcome of case or personal entanglement in the case. Instead, in *Freeman*, trial judge Robert F. O'Neill initially recused himself from a matter, apparently because of his close friendship with a judicial colleague who *Freeman* was rumored to be stalking. After the prosecutor's office advised the Superior Court that it had found no evidence to substantiate the stalking rumors, the supervising judge assigned the case back to Judge O'Neill for trial, over *Freeman*'s objection.

The *Freeman* matter does not involve any issue of the trial court's financial interest in the outcome of the case. Similarly, and though a closer fit, the *Freeman* matter does not fall into the "personal embroilment" category of constitutional disqualifications, which concern cases

where judges were either direct victims in a case or directly involved in the conduct in some way. Where then does *Freeman* fit within the framework of an objective test for mandatory recusal, and what is the California Supreme Court likely to do with this matter?

Predicting what the Supreme Court will choose to do with the *Freeman* matter is assisted by recalling the purpose of Supreme Court review in California. Over a century ago, in *People v. Davis*, 147 Cal. 346 (1905), the Supreme Court explained that its purpose was not to provide further appellate review in individual cases. Instead, Supreme Court review is available only to decide important legal questions and maintain statewide harmony and uniformity in the law. Aside from mandatory death penalty cases, the Supreme Court fills the balance of its docket with cases that raise important issues of public policy or cases where the various Courts of Appeal have issued conflicting opinions on the construction of some aspect of the law.

Looking at *Freeman* with the Supreme Court's purpose in mind is particularly helpful in *Freeman*, given how unsympathetic a figure *Freeman* presents. *Freeman*, an attorney, was accused by her 14-year-old daughter of repeated assaults. After the daughter was removed from her home, *Freeman* apparently attempted to disrupt the foster placement and harass the foster parents. *Freeman* also allegedly solicited one of her own clients to kidnap her daughter from the foster parents, burglarize the foster parents' home and terrorize the foster parents. A jury found *Freeman* guilty of solicitation to commit kidnapping, residential burglary, stalking, and misdemeanor child endangerment and battery. If the California Supreme Court censured itself solely with the facts of *Freeman*'s case, it might reasonably struggle to find cause to reverse the sentence.

But the California Supreme Court will almost certainly look beyond *Freeman*'s specific case to the policies of judicial recusal implicated by her case. If the California Supreme Court follows the U.S. Supreme Court's lead from *Caperton*, it may very well attempt to state an objective test for recusals based upon due process considerations. If the *Caperton*-style test is applied in *Freeman*, the question that must be answered is whether the facts of that case - a friendship between the trial judge and a colleague that could be the target of the accused - are such that a reasonable judge might, even unconsciously, deviate from the "nice, clear and true."

In addition to this due process concern, the Supreme Court must also



guard against court conduct that could undermine public confidence in a fair judiciary. In *Freeman*, Judge O'Neill initially recused himself from the matter, offering remarks that could be construed as his recognition of a potential source of bias. The public, viewing a case in which a trial judge invoked recusal, only to later be assigned to the case by the supervising judge, could doubt the reliability of recusal provisions. The Supreme Court could avoid the more difficult constitutional issues by declaring a bright-line rule that precludes case assignment to a trial judge after recusal, irrespective of the basis for the recusal or other surrounding facts.

It is important to recognize that, at all stages of the *Freeman* proceedings in which he was involved, Judge O'Neill appeared determined to conduct himself in a conscientious manner. The facts of the case certainly don't cry out that an injustice occurred, a point to which the Court of Appeal essentially agreed. Nevertheless, because the California Supreme Court opted to grant the petition for review, the Supreme Court will certainly take the opportunity to offer guidance to courts facing other unusual situations where recusal becomes an issue. If nothing else, clear rules allow the participants in the judicial system to understand the standards governing recusal.

## Navigating California's Tax System

**W**e live in a great state, but we pay a price for it. California's taxes are high, and its tax system is complex. While many states adopt federal tax law wholesale so your state tax is a percentage of your federal, California's legislators pick and choose. Even administratively, our state tax authority adopts some rules but not others. And our agencies and tax dispute resolution system is unusual.

You probably rely on tax professionals to steer your tax boat through California's stormy waters, and you should. As a tax lawyer for the last 30 years, I've seen many California taxpayers go to great lengths to reduce their California tax exposure, some even moving out of state. Unless you're prepared to do that, here are 10 things you should know as a California taxpayer.

Four years, not three: The basic federal income tax statute of limitations is three years. That means once you file a return, the Internal Revenue Service usually has three years to audit. This is measured from your actual filing date if you file on time or late. If you file early, it is measured from the due date.



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The California Franchise Tax Board, which administers California's income tax, gets an extra year, so it has four years not three.

When the statute never runs: California, like the IRS, gets an unlimited time to come after you if you never file an income tax return. The same goes for false or fraudulent returns. In certain other cases (see below), California gets unlimited time to audit.

Following federal audits: Most people know that state and federal tax authorities talk to each other. And they exchange information. What you may not know is that if an IRS audit changes your taxes, you are obligated to notify the Franchise Tax Board within six months. If you don't, the California statute of limitations never runs. That means you might get a billing 10 or more years later.

Amending tax returns: This concept applies to amended tax returns too. If you amend your federal return, California law requires you to amend your California return within six months if the change increases the amount of tax due. If you don't, the statute of limitations-the period of time within which the California Franchise Tax Board can audit you-never expires.

Giving the Franchise Tax Board more time: Although the Franchise Tax Board must normally examine your tax return within four years of when you file it, they sometimes will contact you, asking for more time. They will send a form, asking you to sign it to extend the period of limitations. Some taxpayers just say no, but that usually triggers an assessment, so you should usually agree. You may be able to limit the scope of the extension to certain tax issues or to limit the added time (say to an extra year). You should seek professional advice if you receive such an inquiry.

Compromising California taxes: There's a lot of hype on the internet and television about deals with the IRS. Some of it is true, although "pennies on the dollar" is a regrettable phrase that often sets quite unrealistic expectations. So select carefully if you're hiring someone to try to get you a "deal" with the IRS. You might get more time, and might get penalties waived, and you might even get the amounts compromised based on substantive arguments. But "pennies on the dollar" isn't too common.

Double or triple that advice when it comes to California. Tax professionals all know that a California tax controversy is much harder to settle than a federal one. That has always been true, but it seems even more pronounced today.

No Tax Court: You may know that if you have an IRS dispute, you can fight it administratively with the auditor and the IRS Appeals Office. If necessary, you can then go to U.S. Tax Court (where you can contest the tax before paying), or perhaps the U.S. Court of Federal Claims, or the U.S. District Court (if you are willing to pay the tax first). Although you are well-advised to have a lawyer, many taxpayers don't, and there are abbreviated procedures and relaxed rules of evidence in Tax Court.

Unlike many states, though, California doesn't have a tax court. It has a State Board of Equalization (SBE), which is a five member administrative body (the only elected tax commission in the U.S.) that functions much like a court. If you can't resolve your income tax dispute with the Franchise Tax Board, you can appeal it to the State Board of Equalization. It will hear your case and the counterarguments of the Franchise Tax Board.

The State Board of Equalization rules on the law, but it has equitable powers. In fact, it's not uncommon for the State Board of Equalization to bend the rules if they believe the taxpayer is honest, forthright, and sympathetic.

The State Board of Equalization doesn't just hear income tax appeals. They hear also sales and use tax and even property tax appeals. Confusingly, in addition to the five member State Board of Equalization



(the ruling body) there's also a large agency called the State Board of Equalization that administers sales and use taxes.

"One Way" Appeal and Going to Court: If you win before the State Board of Equalization, that decision is binding on the Franchise Tax Board. The Franchise Tax Board can't appeal or go on to another body or court. If you lose at the State Board of Equalization, you can bring suit in California Superior Court for a *de novo* trial of your tax dispute. That one-way appeal right, something only the taxpayer has, sometimes frustrates the Franchise Tax Board, but it's a nice taxpayer protection.

Of course, if you do sue in Superior Court, you will have a regular judge, not a tax specialist. Most federal tax disputes are heard in U.S. Tax Court, where you'll have a judge with special tax training. Superior Court also offers you the chance for a jury trial.

Sales and Use Taxes: You can't buy things in California without being aware of our sales tax. Sales tax doesn't apply to services, but it does apply to sales of goods. It is imposed on the retailer, but it's usually passed on to the purchaser.

The use tax is the mirror image of the sales tax and is payable at the same rate. It applies to the storage, use, or other consumption of products that you buy out of state and bring into California. So if you buy a new outfit from a mail order or internet company, you can incur California use tax.

Most such small purchases probably escape use tax. But when it comes to business, it's a different story. If you buy new computers for your office and ship them in from Texas, you are liable for California use tax. The State Board of Equalization (the agency, not the five member hearing board) administers the sales and use tax. If you have a dispute, you may end up before the five member State Board of Equalization.

Property taxes: Property taxes are collected by your local city and county tax collectors. They include real and personal property taxes, as well as some more arcane ones. California's property tax system includes Proposition 13, which generally uses a base year and allows reassessment when there is a change in ownership. Since 1978 when that system started, there are many exceptions and overlays.

Still, virtually all property tax is about value, and whether and to what extent there's been a change in ownership that can trigger reassessment. Ownership and valuation issues cover most of the waterfront. A word about personal property taxes. If you own a business-say a law office-you should be filing a personal property statement listing your furniture and equipment. There's more enforcement on personal property taxes these days than there used to be.

This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

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